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No. 91-1158

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1992

THE STATE OF MISSISSIPPI, ET AL.,

Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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There is very little disagreement between the parties¹ regarding the law. With the exception of the jurisdiction question, nothing in Louisiana's brief takes issue with the law set forth by Mississippi. Instead, the disagreement centers on the facts – specifically (1) whether the boundary thalweg ran to the west or to the east of Stack Island; and (2) whether Mississippi exercised sovereignty over Stack Island and Louisiana failed to do so. After hearing and weighing the evidence, the trial judge entered express findings on those issues in favor of Mississippi.

¹ For ease of reference, the petitioners are referred to collectively as "Mississippi" and the respondents are referred to collectively as "Louisiana."

Given the nature and posture of the dispute, one would expect that Louisiana's brief would carefully analyze the district court's findings in light of the clearly-erroneous standard of Rule 52. That, however, has not been done. Louisiana has said almost nothing to indicate why this Court should conclude that the trial judge's account of the evidence was not "plausible"; nothing has been said that demonstrates that the trial judge adopted an "impermissible view" of the evidence. This is the burden that Louisiana must meet. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

Rather than focus on the propriety of the district court's findings under Rule 52, Louisiana undertakes to re-argue and re-try the lawsuit. Louisiana's brief presents a maelstrom of factual assertions, some of which even go so far as to recite "evidence" that is not found in the record even though it was referenced in the pretrial order. In every circumstance, Louisiana's interpretation of the evidence is a matter of dispute between the parties. In no circumstance is Louisiana's interpretation of record evidence or of extraneous matter uncontroverted.

This type of rehashing of the evidence validates the wisdom and importance of assigning the fact-finding function to the trial court. The nature of the record analyses conducted by the Fifth Circuit and renewed here by Louisiana simply duplicates what the trial judge has already done. The factual conclusions made by the Fifth Circuit and re-urged here by Louisiana are conclusions with which the trier of fact clearly could disagree and clearly has disagreed. Consequently, under Rule 52 and this Court's decisions in *Anderson* and *Amadeo*, the decision of the Fifth Circuit should be reversed and judgment should be rendered consistent with the findings and judgment of the district court.

I. LOUISIANA'S TREATMENT OF FACTUAL MATTERS IS BOTH INACCURATE AND INAPPROPRIATE

With one exception, the disputed issues in this appeal are about the facts. Therefore, it is important to have an accurate understanding of the district court's fact findings and of the evidence in the record. Louisiana's brief contains inaccuracies in that regard, and Mississippi believes that it is important to set the record straight at the outset.²

A. Louisiana's misattribution of the "disappearing island theory"

Louisiana attributes findings to the district court that the district court never made. On page 1 of its brief, and again on pages 3 and 32, Louisiana contends that the district court found that Stack Island had "washed away entirely" or "disappeared." In fact, the district court never made any such finding. The reference cited by Louisiana is to the portion of the trial judge's opinion that stated Louisiana's position. The truth of the matter is that the district court rejected Louisiana's position and made exactly the opposite finding:

The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, LA-21, 27, and 29, that there has always been a land mass from 1881 to the present time which map by map can be traced from the original Stack Island. . . .

The Court concludes by a preponderance of the evidence that the land mass which now lies

² Section I does not purport to be a complete listing of the factual errors in Louisiana's brief but is, instead, a sample of the principal inaccuracies.

against the Louisiana bank and which is the portion claimed by the Plaintiffs, is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion. . . .

. . . [T]here is no testimony whatsoever that Stack Island disappeared. The Court simply thinks that the Louisiana parties' position that Stack Island disappeared because it moved out from under the location of the original Stack Island is not well taken. . . .

(Pet. for Cert. App. 32a-33a)

The notion that Stack Island "disappeared" was invented by Louisiana and was expressly rejected by the trial judge. Contrary to Louisiana's statements, there is no finding that Stack Island ever "washed away entirely."

B. Louisiana's mischaracterization of record evidence

In several instances, Louisiana mischaracterizes what the record shows.³ For example, at page 18 of its brief, Louisiana asserts that the map set forth at J.A. 163 shows "the tracks of navigation as of December, 1881." The truth of the matter is that the "track of navigation" reflected on that map was drawn in by Louisiana and was not on the original map.

In a related misstatement, Louisiana asserts that the MRC report "described in detail the location of the main

³ Louisiana's improper treatment of factual matters is not limited to erroneous characterizations of the record. At pages 10 and 11 of its brief, Louisiana also attempts to interject matters that were never placed in evidence. The extraneous matters were referenced in the pretrial order and could, presumably, have been offered into evidence, but Louisiana chose not to do so. It is improper for Louisiana to attempt to interject such extraneous matter into this appeal.

navigation channel at Stack Island in 1881 as being in the east chute channel." (La. Br. 18) The MRC report states no such thing. It was dated November 15, 1883 and covers a time period from December 1, 1882 to November 1, 1883. (See J.A. 146, 147.) The MRC report does not "describe" the location of the thalweg in 1881. Locating the thalweg was not the purpose of the MRC report, and 1881 was not the time period on which the report focused. As will be discussed in more detail in Section II, Louisiana reads far more into the MRC report than can be justified.⁴

C. Louisiana's misstatement of the issues before the district court

Finally, Louisiana's brief conveys a misleading impression of what was considered and decided at trial. In several places, the brief refers to a "new island" or to "separate geographic locations." On page 1, Louisiana charges that the district court "did not discuss the 'new' island." On page 2, Louisiana states that the "trial court also avoided discussing the fact that there are two separate geographic locations at issue." The truth of the matter is that the so-called "new island" and the "separate geographic locations" were not at issue in this case.

Louisiana first came up with these ideas well into the lawsuit. They were initially discussed at a pretrial conference several months before trial and then again just as the trial was about to begin. At that time, the district court clearly ruled, and all counsel clearly agreed, that only Stack Island was at issue and that the so-called "new

⁴ Louisiana's characterization of the evidence relating to the Doctrine of Acquiescence also contains numerous inaccuracies. That evidence is discussed in Section IV below.

island" was not the subject of the lawsuit. (Tr. 21-33)⁵ Everyone has always understood the subject of the litigation. Consequently, the attempt to create confusion by interjecting the notion of a "new island" or "different geographic locations" is improper and should be rejected.

II. THE DISTRICT COURT'S FACT FINDINGS REGARDING THE LOCATION OF THE BOUNDARY THALWEG WERE NOT CLEARLY ERRONEOUS

Louisiana employs essentially two devices in its attempt to justify the Fifth Circuit's rejection of the trial judge's fact findings. First, Louisiana argues that Mississippi's evidence did not contain the "type of data" necessary to support the district court's findings. Second, it is argued that it was "clear error" for the district court to disregard Louisiana's interpretation of the MRC report. As will be shown below, neither argument has any merit.

A. Mississippi's evidence properly supported the district court's fact findings regarding the location of the boundary thalweg

Louisiana's initial argument – that Mississippi's evidence did not contain the "proper type of data" – is completely incorrect. It should be noted that Louisiana

⁵ In a related matter, Louisiana makes reference to "accretionary features" and contends that Mississippi's claim relates to a "bank accretion." (See La. Br. 1, 2.) This misstatement of Mississippi's position should be rejected. Mississippi's claim does not relate to an accretion but, instead, relates to Stack Island. It has always been Mississippi's position that Stack Island did not accrete to the Louisiana bank. Rather, the river channel separating the island from Louisiana gradually filled in with sand and other alluvium. (See J.A. 47-48; 55-56; 61-62; 99.)

did not provide any explanation or offer any legal authority to indicate why Mississippi's evidence is not of the "proper type."

Identifying the location of the thalweg is a fact-bound inquiry that consists of determining the normal route used for downstream navigation. There is no disagreement among the parties in this regard, and the nature of that inquiry has been clearly described by this Court.

It appears to us, as it did to the Master, to be a matter of evidence as to the course commonly taken downstream by vessels navigating the particular reach of the river.

Louisiana v. Mississippi, 466 U.S. 96, 101 (1984). Given the uncomplicated nature of the inquiry, Louisiana's attempt to create arbitrary distinctions between "types" of probative evidence should be rejected.

Mississippi's evidence is highly probative of the boundary between Mississippi and Louisiana, as is reflected in the following documentary evidence.

Exhibits P-1 and P-2
(Tr. 286-87; J.A. 127-28)

These are United States survey maps of Mississippi and Louisiana in the vicinity of Stack Island. The survey maps were prepared in 1826-27 and 1828-29, respectively. P-1 shows Stack Island as Mississippi land. By contrast, Stack Island does not appear on P-2, which is the corresponding Louisiana map. Taken together, Exhibits P-1 and P-2 clearly indicate that the surveyors understood the state boundary to run on the west side of Stack Island.

Exhibits P-3, P-4, and P-5
(Tr. 293, 295, 299; J.A. 129-31)

Exhibit P-3 is an 1867 map of the eastern bank of the river in the vicinity of Stack Island and depicts Stack Island as lying east of the main channel. Exhibit P-4 is a reconnaissance map made in 1874 by the U.S. Army Corps of Engineers. It also shows Stack Island (or Island No. 94) east of the main channel, separated from the Mississippi mainland by a narrow chute channel. Louisiana attempts to dismiss Exhibit P-4 by stating that it was merely a "reconnaissance survey" made from the boat on which "Major Suter was riding downstream." (La. Br. 12) But that is the point – the downstream navigation channel is precisely what is at issue. Exhibit P-4 is clearly probative.

Exhibit P-5 is an 1879 map made as a blueprint for the work of the Mississippi River Commission to narrow the river channel. Like the other exhibits, Exhibit P-5 shows Stack Island lying east of the main navigation channel.

Exhibit P-7 (Tr. 307; J.A. 132)

This is a United States survey map done of Stack Island in August 1881. On the west side of Stack Island, the surveyor noted a "good deep channel" with "no bottom." On the east side of the island, the surveyor noted a "depth of 12 feet" in the chute with "shoals" at the south end of the chute.

Exhibit P-8 (Tr. 313; J.A. 133)

Exhibit P-8 is a shoreline survey prepared in October and November of 1881. It was prepared by the U.S. Army Corps of Engineers for the Mississippi River Commission. P-8 shows the government navigation lights, which clearly indicate that the main downstream navigation channel runs to the west of Stack Island. Exhibit P-8

confirms the United States survey map (Exhibit P-7) prepared several months earlier.

Clearly, the foregoing maps reflect the type of "data" from which a determination can be made regarding the location of the boundary thalweg. Based on those maps (and the other substantial evidence in the record), the trial judge was entitled to find that the normal route for downstream navigation passed to the west of Stack Island.

Louisiana has provided nothing in support of its naked assertion that Mississippi's evidence constitutes the "wrong kind of data." Louisiana has also failed to point to any legal authority that would cast any doubt regarding the propriety of Mississippi's evidence. Consequently, Louisiana's insupportable assertions regarding the "right type" of data should be rejected. Based on the entire record, including the evidence brought forward by Mississippi, there is nothing "impermissible" or "implausible" about the district court's finding that the main downstream navigation channel ran to the west of Stack Island.

B. It was not "clear error" for the district court to reject Louisiana's interpretation of the MRC report

Louisiana's second proffered justification for rejecting the trial judge's findings centers on the MRC report. Louisiana argues that to "misconstrue or disregard the report, as did the district court, is clearly erroneous." (La. Br. 31-32) Essentially, Louisiana argues that the trial judge committed clear error solely because he did not adopt Louisiana's interpretation of the MRC report. Louisiana's interpretation, however, is far from the only one. The report is not as conclusive as Louisiana chooses to believe, and there is nothing in the report that would

have compelled the district court to make certain findings. The trial judge carefully reviewed the MRC report, considered Louisiana's interpretation, and rejected that interpretation. That does not constitute clear error.

The MRC report is a series of annual reports prepared by the Mississippi River Commission to describe its work in narrowing the river channel. Neither the work nor the report was undertaken for the purpose of analyzing or identifying the boundary thalweg. In point of fact, the report does not even purport to conduct any such analysis or to reach any such conclusion. Instead, the MRC report simply recounts certain efforts to improve navigation on the river. Erosion control in the Stack Island area was not originally part of the Mississippi River Commission's work. It was not until after 1881 and during the flood of 1882 that the Commission made it an objective to reduce erosion on the Mississippi bank east of Stack Island.

It is also worth noting that the MRC report does not relate to the time the original patent survey for Stack Island was prepared in August 1881. The report is dated November 15, 1883 and describes work undertaken after December 1, 1882. The report is silent regarding the location of the boundary thalweg in August 1881 and is silent regarding the boundary thalweg location at all prior periods, including the time Louisiana was admitted to the Union or the time Stack Island was formed. The MRC report, therefore, is far from definitive on the boundary issue.

Read in light of its purpose and the time period involved, there is clearly nothing in the MRC report that would require the district court to conclude that the boundary thalweg ran on the east side of Stack Island. Louisiana chooses to interpret the report in that fashion,

but its interpretation is neither compelled nor suggested by the report itself.

Louisiana suggests that the district court completely "ignored" or "disregarded" the MRC report. The district court's opinion unequivocally rejects any such notion. The opinion reflects a detailed analysis of the evidence (see Pet. for Cert. App. 26a-30a) and specifically indicates that the MRC report was considered.

The Court is thus faced with conflicting evidence as to what the normal course of downstream navigation was in 1881 on this stretch of the river. The Court finds a preponderance of the evidence favors the Plaintiffs' theories for the following reasons. . . .

The Court reads the [MRC] report and these maps to indicate that the river certainly is trying to switch its course into the east chute but not necessarily that it had by 1881. The Court, accordingly, rules that as of the date of the survey [1881] that the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island.

(Pet. for Cert. App. 29a, 30a) The MRC report was not ignored or disregarded. The report was carefully considered and weighed together with the other evidence. Contrary to Louisiana's protestations, the report simply does not support Louisiana's claim.

Louisiana's interpretation of the MRC reports did not compel the rejection of the other evidentiary matter in the record. In the language of *Anderson v. City of Bessemer City*, there were different permissible views of the evidence. The trial judge considered all the evidence and made his findings in accordance with one of the permissible views. The mere fact that his findings did not track Louisiana's interpretation does not constitute clear error.

III. THE AUGUST 1881 PATENT DATE WAS NOT THE EXCLUSIVE FOCUS FOR DETERMINING THE BOUNDARY THALWEG

Louisiana argues that Mississippi has changed its theory of the case – specifically that the applicable date for locating the boundary thalweg is the time of sovereignty or island formation rather than the August 1881 effective date of the patent. (See La. Br. 5.) This is simply not true. Mississippi's position has remained constant throughout.⁶ This argument is a red herring.

While considerable attention was paid to the location of the navigation channel at the time of the patent in 1881, that date was not the exclusive focus. As discussed in Section II(A), Mississippi introduced a significant body of evidence predating the 1881 patent. (See Exhibits P-1, P-2, P-3, P-4, and P-5; J.A. 127-131.) Furthermore, Mississippi's proposed findings of fact expressly reference the time of island formation.

Further, from the time of the formation of Stack Island, the island and its accretions have been bounded on the West by the Mississippi River channel thalweg-interstate boundary (Mississippi-Louisiana), and bounded on the East by the chute channel, which has a bed which lies entirely within Mississippi.

⁶ Building on its "changed-theory" argument, Louisiana undertakes to recite its interpretation of various maps and documents that were never introduced into evidence. (See La. Br. 10-11.) Because those matters are not of record, Louisiana's "interpretation" cannot be checked by this Court for accuracy. Mississippi rejects Louisiana's interpretation and also disputes the assertion that Louisiana's failure to offer this "evidence" was occasioned by any so-called change in theory. Instead, the failure to bring that evidence forward was the product of Louisiana's trial strategy.

(J.A. 47, 55, 61) Clearly, the "boundary thalweg" reference is to the time that Stack Island was formed and is not limited to the 1881 patent. Consequently, Louisiana's contention that the exclusive focus was on 1881 is not well taken.

Louisiana's argument misses the point and ignores the unequivocal holdings of this Court. With regard to an island, the time for determining the location of a boundary thalweg is either the date of sovereignty or the date of the island's formation, whichever is later. See *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 401 (1871); *Mississippi v. Arkansas*, 415 U.S. 289 (1974); *Kansas v. Missouri*, 322 U.S. 213, 229 (1944); *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Indiana v. Kentucky*, 136 U.S. 479, 508 (1890). This Court has established the applicable date for boundary determination, and those holdings control.⁷

Even if, as Louisiana suggests, the proper focal point were August 1881, the district court expressly found that the boundary thalweg was west of Stack Island at that time.

The Court, accordingly, rules that as of the date of the survey [August 1881] that the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island. Therefore, the Court concludes that at that time Stack Island was a part of the State of Mississippi rather than a part of the State of Louisiana.

⁷ Louisiana and Mississippi were admitted to the Union in 1812 and 1817, respectively. The earliest evidence in the record regarding the existence and location of Stack Island is found in the circa 1826 township surveys – Mississippi's Exhibits P-1 and P-2. (J.A. 127, 128) That evidence indicates that Stack Island was considered Mississippi land and that the boundary thalweg was west of Stack Island at that time.

(Pet. for Cert. App. 30a) The trial judge's finding controls unless, in the language of *Anderson* and *Amadeo*, the finding is based on an "impermissible" or "implausible" view of the evidence. As shown in Section II, this is not the case.

Louisiana again employs its "disappearing island theory," arguing that, between the dates of the township surveys in 1826-29 and the effective date of the patent in August 1881, Stack Island "disappeared" and "re-emerged." In that fashion, Louisiana hopes to avoid this Court's controlling holdings regarding the applicable date for locating the boundary thalweg. However, there are no findings to support Louisiana's "disappearing island theory." Louisiana's unsubstantiated argument should be rejected.

As discussed in Mississippi's initial brief, the district court did not enter an express finding regarding the location of the boundary thalweg prior to 1881. It is clear, however, that the time of island formation or of admission to the Union is the appropriate focal point and that all record evidence supports the conclusion that the boundary thalweg ran west of Stack Island at that time.

IV. THE DISTRICT COURT DID NOT MISAPPLY THE DOCTRINE OF ACQUIESCENCE

In its treatment of the Doctrine of Acquiescence, Louisiana again confuses the issues. The record evidence is inaccurately stated and the limitations on appellate review of facts are conveniently discarded.

The Doctrine of Acquiescence establishes state boundaries in accordance with the acts of dominion, control, and sovereignty by one state, coupled with the corresponding failure of the adjoining state to exercise dominion or jurisdiction. See *Arkansas v. Tennessee*, 310

U.S. 563 (1940); *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Louisiana v. Mississippi*, 202 U.S. 1 (1906). The determination whether the Doctrine of Acquiescence is applicable is a purely factual determination. See *Kansas v. Missouri*, 322 U.S. 213, 220-27 (1944); *Arkansas v. Tennessee*, 310 U.S. at 567.

The district court heard evidence relating to the Doctrine of Acquiescence and made fact findings in that regard.

The Court, accordingly, concludes . . . that Louisiana has acquiesced in the exercise of the exclusive jurisdiction over the island by the State of Mississippi and that it is now in the State of Mississippi. . . . [T]he period of exclusive jurisdiction by the State of Mississippi has run from 1881 to the present time.

Accordingly, the Court finds that if the land be not in the State of Mississippi because of the thalweg boundary that the land is in the State of Mississippi under the doctrine of acquiescence.

(Pet. for Cert. App. 40a-41a)

The Fifth Circuit's improper treatment of the district court's findings regarding acquiescence is discussed at pages 17 through 26 of Mississippi's initial brief, and that discussion will not be repeated here. The tactics of confusion that are employed by Louisiana in its brief, however, require comment.

First, as it has done with other issues, Louisiana recounts its version of the "evidence" as if to invite the Court to re-weigh the evidence and re-try the case. This invitation to violate the clearly-erroneous standard is reflected in Louisiana's suggested treatment of the testimony of Mississippi's witnesses, which Louisiana maintains "is not credible or worthy of belief" and "should be given very little weight or should be rejected altogether."

(La. Br. 28, 29) The approach taken by Louisiana has been emphatically rejected by this Court. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982) ("Determining the weight and credibility of the evidence is the special province of the trier of fact.").

The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

Anderson, 470 U.S. at 573. On appeal, the focus is not on "weight" or on "credibility." Those issues are reserved for the fact finder. The issue on appeal is whether the district court's finding, taken in view of the entire record, is a "permissible" or a "plausible" one. Louisiana has apparently lost sight of that fundamental rule.

Louisiana's second attempt to confuse the issues is centered on the recitation of actions supposedly undertaken by Louisiana to exercise dominion over Stack Island. This recitation is found on pages 26-28 of Louisiana's brief. It should be noted that the referenced testimony was not before the district court at the time the acquiescence issue was presented for decision.⁸ At Louisiana's request, the proceedings in the district court were bifurcated and the boundary-related issues (the Rule of the Thalweg; the Doctrine of Acquiescence) were decided in the initial phase of the trial. (See J.A. 31-39.) The referenced testimony was not brought forward until after

⁸ With the exception of testimony by Mr. House, all the testimony discussed in this regard was elicited during the second phase of the trial.

the district court issued its decision regarding the boundary between Louisiana and Mississippi. Louisiana's testimony was vague, both with regard to the location at which the actions took place (Stack Island as opposed to the "accretion/accreted area") and with regard to the specific time period involved. Finally, it should be noted that all of the actions proffered by Louisiana occurred in the recent past, long after acquiescence. Nothing in Louisiana's brief creates any doubt regarding the trial judge's finding on acquiescence. That finding cannot be shown to be clearly erroneous.

Nowhere is the attempt to sow confusion more pronounced than in connection with taxation. Louisiana is careful to use the terms "accretion" or "accreted area" rather than "Stack Island." The choice of terms is neither accidental nor innocent. Instead, it is misleading. By careful use of the term "accreted area," Louisiana seeks to convey the impression that Louisiana has levied and collected taxes on Stack Island. There is, however, absolutely no evidence in the record to support that claim. Louisiana's reference to the stipulation of counsel misstates and distorts that stipulation. The stipulation simply reflects that Louisiana collected taxes on the Louisiana mainland, which is distinct from Stack Island. (See Tr. 827-31; J.A. 114-18.) Mississippi has continuously levied and collected taxes on Stack Island. In 1927, 1930, and 1932, Mississippi enforced its tax assessment through foreclosure of the island. (Tr. 211-13, 218; J.A. 75)

As discussed at pages 21-24 of Mississippi's initial brief, Mississippi has continuously exercised dominion and jurisdiction over Stack Island. By contrast, Louisiana has not done so. The district court entered express findings in this regard. The Fifth Circuit's disregard of those findings and its *de novo* treatment of issues relating to the

Doctrine of Acquiescence constitute error and should be reversed.

V. THE DISTRICT COURT PROPERLY ASSERTED JURISDICTION OVER LOUISIANA'S THIRD-PARTY COMPLAINT

Louisiana expressly agrees (La. Br. 38) with Mississippi's identification of the three issues that must be addressed in answering the question about jurisdiction that this Court put to the parties in its order of March 23rd granting certiorari. Louisiana also expressly agrees with Mississippi about the answers to the first two of those issues. Louisiana agrees that the language of 28 U.S.C § 1251(a) does not preclude all other courts from taking jurisdiction of a controversy between two states (La. Br. 38-39), and Louisiana agrees that its intervention and its third-party claim against Mississippi were within the jurisdiction of the district court, both as a matter of federal-question jurisdiction and because of ancillary jurisdiction as applied to intervention of right and to a third-party complaint. (La. Br. 39-40)

Louisiana's position on the third issue is more difficult to fathom. Louisiana says that the district court "lacked power to exercise jurisdiction over land in Louisiana located west of a proper thalweg-boundary" and that "in this case the district court lacked power to exercise jurisdiction over the land in question." (La. Br. 44) At the same time, however, Louisiana says that if a district court erroneously rules in favor of local residents and is reversed on appeal, "the disposition of the extra-territorial land and the proper location of the boundary is a matter for the higher court." (La. Br. 43) It is on this basis that Louisiana concludes by urging that the judgment of the Fifth Circuit, which held that the land in question was

in Louisiana, should be affirmed. (La. Br. 45) If, as Louisiana seems to argue, a district court loses jurisdiction over land if it concludes that the boundary is such that the land is in another state, it is unclear why there should be any difference in result because the decision comes from a higher court. The general proposition announced in *Durfee v. Duke*, 375 U.S. 106, 115 (1963), "that courts of one State are completely without jurisdiction directly to affect title to land in other States," must speak to the entire system of courts. The Nebraska Supreme Court cannot have had power that a Nebraska trial court would not have, and the Fifth Circuit cannot have more jurisdiction than the District Court in the Southern District of Mississippi, whose judgment it is reviewing.⁹

We stand on what we said on this issue in our opening brief. It cannot be the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it. If land is unquestionably in one state, the courts in another state are without jurisdiction to affect the title to that land. But if the issue is whether land is in one state or another and both the states and the private persons with claims to the land are parties to the suit, the court in which the action is pending has jurisdiction to make a final disposition of the matter, whether it finds that the land is in its state or in the other state. The power to decide an issue is the power to decide it either way.

⁹ The result can hardly turn on the fact that the Fifth Circuit includes both Mississippi and Louisiana. If that were a distinguishing factor, there would be one result when the Fifth Circuit was reviewing a decision of a Mississippi district court about an island in the river between Mississippi and Louisiana but a different result if the island in question were between Mississippi and Arkansas.

CONCLUSION

The judgment of the Fifth Circuit should be reversed and judgment should be rendered as prayed for in Mississippi's initial brief.

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